ORBIS INVESTMENT ADVISORY (CANADA) LIMITED

SUITE 2600, METROTOWER I, 4710 KINGSWAY, BURNABY
BRITISH COLUMBIA, V5H 4M2, CANADA

TELEPHONE: +1 778 331 3131 E-MAIL: CLIENTCANADA@ORBIS.COM WEBSITE: WWW.ORBIS.COM

September 29, 2016

Via email: comments@osc.gov.on.ca

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
The Manitoba Securities Commission
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission
Ontario Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan

In care of:

Joseé Turcotte, Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario
M5H 3S8

Re: Comments to Consultation Paper 33-404: Proposals to Enhance the Obligations of Advisers, Dealers, and Representatives toward their Clients

Dear Sirs/Mesdames,

We appreciate the opportunity to comment on the proposals raised in Consultation Paper 33-404 ("**CP 33-404**"). As a registered exempt market dealer, we believe that registrants should be regulated in a way that engenders the trust and confidence of our clients. To that end, we support those initiatives, including the proposals in CP 33-404, that recognize different business models require different levels and different types of regulation. We do not believe that a one-size-fits-all approach leads to the best outcomes for investors. Regulations should be applied in a proportional way, taking into account the different categories of registration (e.g., dealer vs exempt market dealer), the types of clients serviced by a registrant (e.g., retail vs permitted clients; institutions vs natural persons) and the range of products handled by a registrant (e.g., third-party, proprietary or mixed). Failure to account for registrants' business models will inevitably lead to under-regulation in some areas and over-regulation in others.

Generally, we support the targeted reforms and their goal of protecting retail investors. We believe, however, that there are certain areas of the proposals that either need clarification or that are not appropriate to all business models. We will focus on consultation questions 36-38, 44-45 and 46-47.

36. Please indicate whether a regulatory best interest standard would be required or beneficial, over and above the proposed targeted reforms, to address the identified regulatory concerns.

37. Please indicate whether you agree or disagree with any of the points raised in support of, or against, the introduction of a regulatory best interest standard and explain why.

38. Please indicate whether there are any other key arguments in support of, or against, the introduction of a regulatory best interest standard that have not been identified above.

We believe that regulation is most effective when it is sufficiently flexible to accommodate different business models. As currently formulated in CP 33-404, the best interest standard would apply to all registrants in respect of all clients. Notwithstanding the representations of the CSA to the contrary[1], this does not align with conduct expectations of key international standard setters such as IOSCO[2] or the OECD[3].

We agree with IOSCO and the OECD that applying a best interest standard to a registrant who deals in a wide variety of products and with retail customers may be entirely appropriate but it does not follow that the same standard should be applied to a registrant who deals in proprietary products with other registrants, professional market participants or sophisticated investors. Regulations in other jurisdictions reflect this fundamental insight, which is absent from CP 33-404. We note, for example, the SEC's notice of rulemaking adduced by the CSA describes a new rule for a uniform fiduciary standard of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to ***retail***

---

[1] Footnote 37 of CP 33-404 makes reference to several international publications but fails to explain that those publications do not argue in favour of the application of a unitary standard of conduct to be applied in all cases. On the contrary, the source publications explicitly assert that rules of business conduct must be sufficiently flexible to accommodate different business models.

[2] See paragraph 8 of IOSCO's International Conduct of Business Principles (July 1990) (cited in footnote 37 of CP 33-404). "The formulation of conduct of business rules and the implementation of rules based on such principles can boost investor confidence in the market. In order to reflect the realities of today's markets, such rules of business conduct should be flexible enough to differentiate between professional and non-professional market participants."

[3] See the OECD's Effective Approaches to Support the Implementation of the Remaining G20/OECD High-Level Principles on Financial Consumer Protection (cited in footnote 37 of CP 33-404). The OECD's view is that financial services providers and authorized agents have a responsibility to work in the best interest of their ***consumers***, where "the role of the consumer is that of retail customer rather than high net worth individuals or institutions."

customers[4]. Similarly, in the United Kingdom and Australia, the rules cited by the CSA that a firm must act in accordance with the best interests of its clients apply only in relation to ***retail*** clients[5]. We believe that the emphasis on the protection of retail clients is the correct approach. When a registrant is dealing with other registrants, professional market participants or sophisticated clients (i.e., non-individual permitted clients); however, those clients are more likely to understand, and be able to act upon, their own best interests instead of the registrant using assumptions of what is in the client's best interest. The informational asymmetry where a non-natural client understands what is in its own best interests better than the registrant may lead to sub-optimal or irreconcilable[6] outcomes if the registrant is required to substitute its judgment for that of the client. Thus, the best interest of the client standard, if adopted, should be adopted in the retail context only. This would be in line with the international developments and the general approach and expectations of key international standard setters and regulators cited by the CSA.

44. Is it appropriate that disclosure by firms be the primary tool to respond to a conflict of interest between such firms and their institutional clients?

45. Are there other specific situations that should be identified where disclosure could be used as the primary tool by firms in responding to certain conflicts of interests?

In the case of non-individual permitted clients, unless the interests of the registrant are materially opposed to the interests of those clients, disclosure by firms is, and should be, the primary tool to respond to a conflict of interest. Non-individual permitted clients have the experience, resources and incentive to evaluate any conflict of interest. This principle has been

---

[4] See the SEC's Release No. 34–69013, Duties of Brokers, Dealers, and Investment Advisers (cited in footnote 40 of CP 33-404). CP 33-404 quotes the purpose of the release as requesting "quantitative data and economic analysis, relating to the benefits and costs that could result from various alternative approaches regarding the standards of conduct and other obligations of broker-dealers and investment advisers." CP 33-404, however, omits the next sentence in the release, which states that the SEC "intend[s] to use the comments and data we receive to inform our consideration of alternative standards of conduct for broker-dealers and investment advisers when providing personalized investment advice about securities to ***retail*** customers."

[5] For the United Kingdom, see Section 2.1.1(2) of the Conduct of Business Sourcebook in the Financial Conduct Authority Handbook. "This rule applies in relation to designated investment business carried on: (a) for a ***retail*** client; and (b) in relation to MiFID or equivalent third country business, for any other client." The qualified statutory best interest standard in Australia (cited in footnote 52 in CP 33-404) applies only to retail clients. See section 961 of the Corporations Act 2001 (Australia). "This Division applies in relation to the provision of personal advice (the advice) to a person (the client) as a ***retail*** client."

[6] For example, if two registrants have each other as a client and are required to substitute their judgment for that of the other.

recognized in several contexts, e.g., the greater investment flexibility available to accredited investors and permitted clients. We understand and agree that there may be certain situations where disclosure would not be sufficient and the only appropriate response would be avoidance.

46. Is this definition of "institutional client" appropriate for its proposed use in the Companion Policy? For example: (i) where financial thresholds are referenced, is $100 million an appropriate threshold?; (ii) is the differential treatment of institutional clients articulated in the Companion Policy appropriate?; and (iii) does the introduction of the "institutional client" concept, and associated differential treatment, create excessive complexity in the application and enforcement of the conflicts provisions under securities legislation? If not, please explain and, if applicable, provide alternative formulations.

47. Could institutional clients be defined as, or be replaced by, the concept of non-individual permitted clients?

In CP 33-404, the CSA states that the application of the proposed reforms is tailored for institutional clients and order execution-only services.

We are concerned that creating a new category of "institutional client" is an unnecessary distinction that will create compliance costs for registrants without delivering any benefit that could not be achieved through the application of current investor categories. The terms "accredited investor" and "permitted client" are well understood by registrants and ensure a certain level of compatibility between various national instruments and securities laws. The term "non-individual permitted clients" achieves the same regulatory goals, i.e., giving a higher level of protection to natural persons, without complicating the regulatory milieu. Furthermore, as demonstrated by the proposed definition, the existence of a third category is likely to lead to divergence between what should be closely related concepts. The proposed definition of "institutional client" is basically the existing definition of "permitted client" in National Instrument 31-103 ("**NI 31-103**") except that it (1) requires pension funds regulated by OSFI or a pension regulatory authority of a jurisdiction in Canada to have net assets that exceed $100 million (regulated pension funds have no such limit in NI 31-103) and (2) increases the threshold for non-individual persons from $25 million to $100 million in financial assets. No rationale for these changes has been given. We do not believe that a regulated pension fund or non-individual person with $25 million in financial assets is less sophisticated in any meaningful way which warrants different regulatory treatment from a regulated pension fund or non-individual person with $100 million in financial assets.

Moreover, the proposed reduction in the categories of institutional clients in respect of which the suitability, KYC, proprietary product and client facing rules do not apply will create excessive complexity in the application and enforcement of those rules to clients who were permitted clients under NI 31-103 but are no longer institutional clients under CP 33-404. For

example, NI 31-103 exempts registrants from having to undertake a suitability determination of a product of sold to a regulated Canadian pension fund which has waived its right to have a suitability determination and the registrant does not act as an adviser for a managed account of the pension fund. Under CP 33-404, registrants holding securities for regulated Canadian pension funds with less than $100 million in net assets will have to undertake a suitability analysis notwithstanding that that such funds have previously waived their rights to have suitability determinations made for all trades under a blanket waiver.

Finally, we note that the application of the proposed reforms in respect of order execution-only services should be described in that context and not just limited to the context of discount brokerage services in recognition that other registrants offer order execution-only services.

***

We would like to thank the CSA for the opportunity to comment on significant proposals like those raised in CP 33-404. We will continue to monitor the development of these proposals and look forward to further engagement on this topic. Should you have any questions or wish to discuss these comments, please contact me directly by phone at (778) 331-3000 or by email at ian.noetzel@orbis.com.

Yours sincerely,

Orbis Investment Advisory (Canada) Limited

/s/ Ian Noetzel

By: Ian Noetzel, Legal Counsel